accordingly filled, but before the remainder were filled, the whole was burnt up. The court held, that those which were filled were the vendee's loss, those unfilled were the vendor's.

A distinction is to be taken between those cases in which the operation is to *precede*,[1] and those in which it is to succeed delivery.[2]

The question in these cases is not whether the vendor may resume his possession, but whether the property has ever passed from him; in other words, whether there is a *complete* contract.

G. G. W.

Boston, Mass.

RECENT AMERICAN DECISIONS.

In the Chancery Court of Memphis, Tennessee.

ALICIA ANN GAUGH ET AL. *vs.* WM. B. GREENLAWS ET AL.

1. A bill of review should be filed in the court where the original cause was heard, but the objection to the jurisdiction of another court is waived, if not taken by demurrer or plea.
2. A bill of review will not lie, unless there be error apparent in the body of the decree, without further examination; or new matter hath arisen in time after the decree, or new proof came to light after the decree made, which could not possibly have been used at the time the decree passed; and an infant defendant, if represented by a *guardian ad litem*, will be subject to this rule.
3. A voluntary conveyance (prior to the act of 1852,) could not be set aside as fraudulent against creditors, except at the suit of a creditor whose debt was ascertained by judgment.
4. If a father purchase land, and take the title in the name of his infant child, it is deemed in law an advancement, and no trust results to the father subject to execution at law; nor is the land liable for the subsequent debts of the father.

[1] Wallace *vs.* Breeds, 13 East, 522; Bush *vs.* Davis, 2 M. & S. 396; Shepley *vs.* Davis, 5 Taunt. 617; Hanson *vs.* Meyer, 6 East, 614. "If anything remaining to be done on the part of the seller before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer."—Lord Ellenborough. See Barrett *vs.* Goddard, 3 Mason, 111.

[2] But where the act of measuring, weighing, counting, &c., is to be done subsequently to the delivery, the sale is complete and the vendor's right is gone, even if such act is not performed. Swanwick *vs.* Sothern, 9 A. & E. 895; Macomber *vs.* Parker, 13 Pick. 175; Riddle *vs.* Varnum, 20 Pick. 280; Code Napoleon, 1586.

5. A valid judgment and execution must be shown by a party who seeks to support a title to land under a sheriff's deed for the same.
6. A purchase of land by a *guardian ad litem* of an infant defendant, pending a suit in chancery involving the title to the land, is champertous and void.
7. A decree in chancery obtained by fraud, is void, and a court of chancery upon original bill will set it aside, and restore the party defrauded to his former situation and rights.
8. Equity favors innocent purchasers without notice, who have paid a full consideration and taken conveyance for land; but where a purchaser has actual or constructive notice of an outstanding title, he will not be protected against it.
9. Whatever is sufficient to put a purchaser on inquiry is equal to notice, and he is bound at his peril to take notice of every deed, necessary to make out his title; and if his title deeds lead to facts disclosing an adverse title, the law charges him with knowledge of such facts.
10. A mortgage is not such an outstanding legal title as will repel an innocent purchaser without notice, the legal title is deemed to remain in the mortgagor.

The pleadings and facts are stated in the opinion of the court.

Yerger & Blythe, and *Wickerson & Beecher*, for complainants.

A. Wright, Smith & Stovall, Williams & McKissick, and *S. Bailey*, for defendants.

The opionion of the court was delivered by

DIXON, S. J.—The bill is filed in this cause by the complainants Gaugh and wife Alicia Ann, against the defendants Greenlaws and A. Henderson, to set aside and annul a decree rendered in the Chancery Court, at Somerville, in the year 1845. The bill is framed in the double aspect as a bill of review, and as an original bill to set aside the decree for fraud. It is alleged in the bill that sometime in the year 1840, the friends of the family of A. Kernahan purchased of H. L. Vance, a lot of ground in the city of Memphis, No. 358, and had the same deeded to the complainant Alicia, then an infant, five years old, that afterwards the same was levied upon and sold as the property of A. Kernahan, the father of Alicia Ann, by an execution at law, and that subsequently a decree was rendered erroneously and fraudulently, divesting the title out of Alicia and vesting the same in Andrew Henderson, the vendee of William Henderson, who purchased under the sheriff's sale. The defendant, A. Henderson, answers the bill, denies all fraud, charges

that the lot was purchased with the money of A. Kernahan, the father, and that the legal title in Alicia was a resulting trust, and as such subject to an execution at law against the father, relies upon the sheriff's deed and the decree at Somerville. The Greenlaws in their answer deny all knowledge of any fraud; charge that they are bona fide purchasers for a valuable consideration paid, without notice—deny the jurisdiction of the court to entertain the bill as a bill of review; upon which state of the case, as presented by the bill and answers, the cause is submitted. The first question to be considered is—Has the court jurisdiction of the cause as a bill of review? I was of opinion until the submission of the cause, that under no state of circumstances could a court of concurrent jurisdiction review the records and decrees of another, upon supposed errors of law; but on further investigation, I find the rule thus laid down:—"Where no circumstances can give the Chancery Court jurisdiction, it will not entertain the suit, even although the defendant does not object to its deciding on the subject; but when the defence intended to be made is that another court of equity has jurisdiction of the cause, it should be taken by demurrer, if it appears on the face of the bill; if it does not appear on the face of the bill, then by plea; for in some cases, if the objection is not thus taken *in limine* it will not avail the party to insist upon it at the hearing." Story's Equity Pld., sects. 487 and 488; Cooper's Equity, 160, 262.

In the manuscript opinion of the Supreme Court, *Anderson* vs. *Bank of Tennessee*, in which the decree was made as to the power of one Chancery Court to review the decrees of another, the question arose upon demurrer; and though I do not perceive the reason of the rule, it is sufficient that the law is thus written. Taking the jurisdiction of the court as being waived for want of demurrer or plea, does the matter contained in the bill present such a state of facts as will bring the case within the rule laid down in the ordinance of Lord Bacon, which is thus stated;—"No bill of review shall be admitted except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath arisen in time after the decree,

and not any new proof which might have been used when the decree was made; nevertheless upon new proof that is come to light after the decree made and could not possibly have been used at the time the decree passed, a bill of review may be grounded by the special license of the court and not otherwise." 2 Bacon's Works, 479, 1st Ordinance.

It is not contended that the decree contains error in law, appearing in the body of the decree, and if it were contended for, I think it clearly settled in the case of *Whitmore* vs. *Johnson*, 10 Humphrey, where the court says:—"If the decree is regular on its face and complete in itself, embodying all the facts and every matter essential to establish the perfect right of the complainant in equity to the relief claimed, and likewise to show the jurisdiction of the court, in the particular case, to grant such relief, may be offered and used as evidence of title, or for any other purpose without the production of the bill, answer, or any other part of the record." The decree in this cause, I think comes up to the requirements of that decision in 10 Humph. But it has been argued with a good deal of earnestness, that the complainant, Alicia Ann, was a child at the time the decree was rendered, and did not and could not have known of the facts which were necessary to her defence, and which facts have come to her knowledge since the decree was rendered, and that consequently a bill of review will be entertained by the court. The argument is a good one as to her, if she had not had a guardian *ad litem*, to defend for her, and see that her interests were protected. But a guardian *ad litem* was appointed and appeared for her by answer—and I think from all the proof in the cause, the guardian had full knowledge of every fact, or could with ordinary diligence have procured it all upon which the decree is sought to be reviewed; for it may be truly said of him, of the proceedings in that suit—"all of which I saw, and the greater part of which I was"—and being thus represented and acting through her guardian *ad litem*, his knowledge, *quoad hoc*, was hers. I do not think, therefore, there is such error appearing in the body of the decree, without further examination, nor any new matter which has arisen in time after the decree; nor is there any new proof that

has come to light after the decree made, which could not possibly have been used at the time the decree passed, which could alone give the court power to review the same; and so far as the bill seeks review of the decree at Somerville, it will be dismissed.

As to the power of the court to entertain the bill as an original bill, to set aside the decree for fraud, no question is made, and that if the decree was obtained by fraud it is void, is conceded by counsel for defendants. The complainants allege that the property was bought with the money furnished by the friends of the family, and the deed directed to be made to Alicia Ann; if so, A. Kernahan had no rights on the property, either legal or equitable; aad further, they say, if the money was furnished by the father, and the deed made to the child, the law presumes it to be an advancement, and no trust results unless it is proved that it was made to hinder, and delay, and defraud creditors existing at the time of the conveyance. I take the law to be, and the rule is laid down with great clearness, as I think, in *Chute* vs. *Harder*, 1 Yerger. If A take a conveyance in the name of B, and his heirs, for land, the purchase money of which he has paid, the trust is extendible under the statute of Charles, for B is a trustee, and he is seized by the conveyance for A, the *cestui que trust;* but otherwise, where only a title-bond is given, and the trust estate springs out of the conveyance by deed, which is the seizure of the trustee by force of the statute, and an execution against A, will attach against the trust estate. The distinction, says the court, is well established between a covenant to convey, and a conveyance; a trust raised or springing by virtue of a conveyance, is subject to execution at law; but a trust raised or springing from a *covenant* to convey, is not subject to execution; the distinction is clear and definite, supported by reason and authority. It is essential to a resulting trust, that it should arise from some deed or conveyance. And the land may be sold, on an execution under a judgment against the cestui que trust. *Foote* vs. *Calvin*, 3 J. R. 216.

Was then the money furnished by A. Kernahan, the father? I do not think the proof is that way; but the weight of proof is entirely on the other side, except the testimony of Kernahan, whose

testimony, I think, was incompetent, and had the same been objected to, would have been excluded, for the reason that he was at the time he gave his deposition directly and manifestly interested in the event of the suit. On the 3d October, 1842, A. Kernahan having previously purchased the lot of William Henderson, deeds the same in trust to Seth Wheatley and J. R. Williams, to secure four notes due in one, two, three, and four years, for $500 each, and notwithstanding he afterwards, 23d June, 1843, conveyed the same to A. Henderson by quit claim, Henderson assuming to pay the notes. Would that release him from liability to pay them, if it should turn out he had no title to the land? I think not; in the case of *Galloway* vs. *Willie*, 2 Yerger, the court, after stating that the weight of authority was nearly if not quite equally balanced as to the admission or rejection of the evidence of a bargainor to prove his own acts void, decides that he is a competent witness where he is not repelled on the ground of interest in favor of the proposition he is called upon to support; but admitting him to be competent, there is no proof of the existence of indebtedness contemplated by the decisions of the State of Tennessee so as to make the deed to Alicia Ann void for fraud, the deed could only be void as to the creditors. Who are creditors? No one can be recognized as a creditor until he has established his right to claim in that character by a judgment at law, or a decree in Chancery. 5 Humphreys, 26, 66. The proof is, that Kernahan was indebted, but no judgment or decree, and no one seeking to subject the property, except creditors subsequent to the deed, and they could make no pretence to setting aside the deed unless it was made to defraud prior creditors. It has been held in Kentucky, *Crozier* vs. *Young*, 3 Monroe, 158, that where the title is made with the money of the father by a third party to the child, the deed is not fraudulent as to either prior or subsequent purchasers, and not subject to the father's debts. In the case of *Doyle* vs. *Sleeper*, 1 Dana, 560, the court decided that a purchase of property by the means of the father, and the deed made to the children, is fraudulent as to prior and good as to subsequent creditors. Where property is conveyed to a child, the presumption of law is, that it was an advancement,

and a subsequent purchaser will not be relieved. 1 Leading Cases in Equity, 195; *Dyer* vs. *Dyer*, 1 Meigs' Dig. 556.

But supposing there was a trust estate, and that the same was liable to execution under judgment against the father, there is nothing to show that a *venditioni exponas* ever issued, except the recitals in the sheriff's deed. Is that sufficient proof of the fact? I think not. The law presumes that an officer, clothed with proper authority, did his duty; and a return upon process, lawfully issued, is prima facie truth of the facts stated. But I think it would be going too far, to presume authority to sell a citizen's property, on the part of an officer, when the memorandum or records of the court show none, and so far as negative proof can do so, the recital in the deed is contradicted by the record, for the record, such as it is, if it proves anything, shows the venditioni exponas was issued on the 15th April, 1842, and the deed recites it as tested of the June term, 1842. Certainly an action of ejectment could not be maintained on such proof. See 2 Greenleaf's Ev. title Ejectment, sect. 316.

When a party sets up title to land under a sheriff's sale, it is incumbent for him to show a judgment rendered by a court of competent jurisdiction, and valid execution issued thereon, as well as to produce the sheriff's deed. Not to require the execution to be produced, is equivalent to deciding, that the judgment *per se* divests the title of the owner. Blackwell's Tax Titles, 96, and cases there referred to. The deposition of Topp shows, that the purchase was made by other parties than the father; the money was paid by Joseph Henderson, and the directions to make the deed to Alicia were made by Joseph and others, who had talked to Topp about it. Besides, Topp says that he regarded the lot as worth $500 or $600, and in consideration that it was to go to the wife and children, by contribution made by friends of the family, he considered that he was giving more than one quarter of the value of the lot for that purpose. McLean's testimony is confirmatory of the fact, for he says he contributed $10, and others in the lodge contributed for that purpose, either to buy a lot or build a house.

I do not think that there is sufficient proof to show power in the

sheriff to sell the estate, and if that were so, there was not such an estate in Andrew Kernahan to the lot 358, as was subject to execution at law, and the purchaser, W. Henderson, took nothing by the sale and deed, and that the legal estate remained in Alicia Ann up to the rendering the decree at Somerville.

The next question arising under the pleadings and proof, is as to the decree rendered at Somerville. 1st, Whether the same was obtained by fraud and collusion; and 2d, If it was so obtained, can the defendants in this cause protect themselves against its legal effect and consequences by their answer as bona fide purchasers for a valuable consideration paid without notice. The first question, depending almost entirely upon proof, I deem it necessary to recapitulate it. The bill was filed 4th of March, 1844. On same day Wm. Henderson, agent for complainant, makes oath before the deputy clerk that the defendant is an infant, has no regular guardian, and prays that John Delafield be appointed guardian *ad litem.* On the 7th of March, notice is directed to Delafield of his appointment as guardian *ad litem.* Delafield acknowledges service of process, March 12th, and answers on the 18th of March, 1844. The complainants object that these things are all irregular. I do not think so far as the appointment of the guardian, the service of process upon him and his answer, there is anything unusual or very irregular, and if there was nothing else in the record irregular, I should attach but little importance to them; but on the 15th of March, the infant is served with process—the replication is not filed till 3d of June, 1844, and the deposition of A. Kernahan is taken on the 19th of March.—Whether by consent or not does not appear, except by the testimony of Judge Bailey, who says the same was taken *de bene esse,* and that Delafield was present, wrote down the interrogatories, and the answer of the witness, all of which are leading, necessarily suggesting the answers to each one as they were answered, fully establishing the cause for the complainants, and no cross-interrogatories put to him to elicit any fact in favor of the infant, or to lead to any information by which a defence might be made for her. This under some circumstances might be regarded as ignorance or negligence, but upon examination we find that Delafield was a

lawyer, was partner of the attorney, Gallagher, originally employed to get the decree; was cognizant of the fact that Wm. Henderson had purchased the property at sheriff's sale on the 2d of October, 1842, and that Henderson had conveyed the lot to Kernahan on the 3d of October, 1844, and that Kernahan had on the same day conveyed the same to Wheatley and Williams, in trust, to secure the purchase money—for he witnessed them both, but on the 4th day of June, 1844, whilst the suit is pending, still acting as guardian *ad litem*, he purchased the property of Andrew Henderson, who had given Kernahan $750 advance on his purchase, and becomes the real plaintiff in the cause and holds the whole estate antagonistic to the infant, whose interest he readily and with avidity undertook, I may say, with indecent haste to guard and protect. Is this fair dealing? Is this just? In the eyes of the guardian *ad litem*, it may look like good morals and faithfully executing his trust, but in the language of an eminent chancellor, "good judges and good lawyers abhor such things." These facts connected with the facts as detailed by witnesses as to the habits and intoxication of Kernahan, his improvidence and the necessarily debilitated mind by which he came under the influence of Delafield, make it clear to my mind that the whole thing was gotten up for the purpose of fraudulently getting a decree against the infant and divesting her of the title, and that Kernahan was but a puppet in the hands of the guardian *ad litem*, to accomplish it. Great stress is laid upon the fact that Judge Bailey was present and took the deposition. I think that Judge Bailey was the last man that would have contributed or connived at a transaction fraudulent, and he is the last man to whom they would have given intimation of such an intention. He was the attorney for Henderson, and was of course anxious to have the interest of his client advanced, and readily accepted the service of the guardian *ad litem*, in taking the depositions, and I think it unfortunate for the interest of the infant that he was not employed for her, as she would now be standing in a very different attitude. Delafield not only purchases whilst guardian *ad litem*, but whilst the suit was pending. Will a court of equity recognize such a purchase? Is it

not champertous and void? The law is thus laid down in Bacon's Abridgment, title Champerty: the purchase of land pending a suit in equity is champerty.—Statute Edward I., ch. 15, 1 Eng. Stat.

I think the decree was obtained by fraud on the infant at Somerville, and where a decree has been obtained by fraud, the court will restore the parties to their former situation, whatever their rights may be, and it has been said, that "where an improper decree has been obtained against an infant, without actual fraud, it ought to be impeached by original bill."—Mitford's Equity Pleading, 93.

The last point that is presented for consideration, is on the answer of the defendants, the Greenlaws, that they are purchasers for a *bona fide valuable consideration paid* without notice, and that, although the decree may be void as to the defendants Henderson and Delafield, who had actual notice of the transaction, they are protected as such. I must confess, that I have had much difficulty on this point of the case, and do not feel free from fears as to the correctness of the conclusion to which I have come. The doctrine is unquestioned in all the books, that purchasers are favored in law, and courts of Equity always lean to the innocent purchaser for reasons of public policy, and where it can be done with safety to the rights of others, the law will protect a bona fide purchaser. That the defendants, who claim the legal title in the present case are innocent purchasers, so far as actual knowledge of the transaction, both their answers and the failure to fix that fact upon them by the complainants, fully prove. But a party may be an innocent purchaser so far as his personal knowledge goes, and yet the law may fix upon him what it terms a constructive notice or knowledge.

The doctrine is thus laid down by Lord Eldon, to a note in 2d volume, part 1, Leading Cases in Equity, page 46: "If a man buys an estate and a bill is filed and a title shown to relief, he may plead that he is a purchaser for a valuable consideration without notice, and he must support his plea by denying all the circumstances from which notice may be implied." And further on, at page 83, same book, "the plea must not only deny actual knowledge of the title, or incumbrance relied on by the plaintiff, but must deny all notice of its existence, which necessarily includes

technical or constructive, as well as actual notice. Notice being actual or implied, when anything appears which would put a man of ordinary prudence upon inquiry. The law presumes that such inquiry was actually made, and therefore fixes the notice upon him as to all legal consequences."

Whatever is sufficient to put a purchaser upon inquiry, amounts to notice. 1 Meigs' Dig. 246. Now, how do the parties defendants, here stand in relation to notice of legal or equitable title; if he begins at the foundation of the title, he finds it in Alicia Ann; the next step is the sheriff's deed, under a sale made in pursuance of a judgment against Andrew Kernahan; these are all matters of record, and necessarily brought to the purchaser's notice in tracing the muniments of title; he next finds a deed to A. Kernahan from the purchaser at sheriff's sale, and then again from A. Kernahan to A. Henderson, and from A. Henderson to J. Delafield, lis pendens, and whilst Delafield was acting as guardian ad litem to the infant. The defendant's counsel seem to rely a great deal upon the cases reported in 2 Leading Cases in Equity, part 1, page 64, as conclusively settling the doctrine, that if a party *believes* he is acquiring the legal title in his purchase, it will be protected by the court; the substance of the cases there laid down, is that a purchaser of the legal title in England takes it discharged of every trust in equity which does not appear on the face of the conveyance, and of which he has not had notice, actual or constructive, and that it is immaterial whether the title be legal or equitable, if the vendee suppose it to be legal. There is some confusion upon the subject of purchasers *bona fide*, growing out of the facts, that deeds are not registered in England and remain in the possession of the purchaser, which are easily explained by attending to the explanations and distinctions so satisfactorily made in the case of *Craig* vs. *Leeper*, 2 Yerger, 193. In England actual possession and occupancy is the seizin of the land, and is generally the best evidence of title; the deed being merely ancillary, not being registered, no constructive notice follows from its existence, but only actual notice, and where the vendor is in actual possession, the vendee may well believe that he is getting the legal title, and he is not

affected by any outstanding title, either legal or equitable by constructive notice. But in this country all the title papers are of record, and ordinary diligence can ascertain in whom the legal title is vested; and because it is in the reach of all, all are affected by its existence, and bound to take notice at their peril. A purchaser is bound to take notice of every deed necessary to make out his title, and if his title deed lead to facts, he is bound to know the fact. 1 Yerger, 360, *Nelson* vs. *Allen and Harris*; 2 Meigs' Dig. 786; 1 Johnson Ch. 575; 2 Daniell's Ch. 779.

The complainant's counsel have placed a good deal of stress upon the fact, that mortgages were given upon the property and were still upon it unsatisfied when defendants purchased, and arguing from thence that the defendants did not get the legal title; the defendants, in answer to that, claim the admissions in the bill that they were paid off. I do not think the circumstance of their existence, or their being paid off, cuts any figure in the present case, as the mortgagors are not claiming in this suit, not parties in any way, and hence it is of no importance to the complainant, she being neither injured or benefited by the existence or payment. The law upon this subject is so clearly and forcibly laid down in 1 Smith's Leading Cases, fifth American edition, page 662, notes to *Keech* vs. *Hall*, that I thought it but proper to transcribe the substance of it:

"Notwithstanding some earlier decisions, which look the other way, it is now settled throughout this country, that the *mortgagor* is vested with the incidents of both legal and equitable ownership, as it regards all persons, save the mortgagee and those claiming under him; and some have gone so far as to decide that the interest of the mortgagee after his death goes to his executor and not to the heirs. But whilst such is the law between the mortgagor and third persons, a different rule prevails in many parts of this country in regard to the mortgagee; who is held to have all the rights of other grantees in fee, subject to a condition which has not been performed." See also Story's Equity, sect. 57. So I really think with one of the counsel, that the mortgages in this case are but "umbras in aqua, vox et preterea nihil."

There is another fact in relation to these transactions, of which the defendants are bound to take notice, for it is of record: that the guardian ad litem purchased pendente lite, and the law clearly is, that it is champerty, and as such void. Champerty, in any action at law, seems to be agreed to be within the statutes of Edw. 1 and Henry 8, and the purchases of land pending a suit in equity concerning it, hath also been holden to be within it; also a lease for life or years, or a voluntary gift of land pending a plea, is as much within the statute as a purchase for money, and, as we have before seen, the same is void. 2 Bacon's Abridgt. 186. See also the case of *Jackson* vs. *Andrews*, 7 Wendell, 156, where it was decided that a purchase pending a suit concerning it, was champertous in the hands of *bona fide* purchasers, and absolutely void; and that possession under a void conveyance does not defeat the operation of a conveyance on the ground of being held adversely, for in such case the possession is not adverse. This decision was made under the statute of New York; but the statutes of Edw. 1 and Henry 8, I take it, are in force in Tennessee. Nicholson and Caruthers' Statutes of Tennessee, pages 437 and 438.

No one is more ready to act upon the maxims "omnia presumatur rite, et solemniter esse acta," and "res judicata pro veritate accipitur," both in the spirit and the letter, when the case is fairly presented, than I am, and nothing is brought to bear to remove that presumption; but I find the law laid down, that fraud vitiates trusts and corrupts every transaction into which it enters, whether acted in pais, or whether it enters into decrees and judgments.

The defendants rely upon the decision in the case in 4 Sneed, *Kernahan* vs. *Greenlaw*, as settling the case; I do not think that decision amounts to anything more than what has been decided often before, that a judgment or decree which is not void upon its face, cannot be attacked collaterally. 6 Humphreys, 444; 5 Humphreys, 319. The case in 2 Schoales and Lefroy 556, *Burnell* vs. *Haind*; the case of *Loyd* vs. *Johns*, 9 Vesey, 36; and also the case of *McCormack* vs. *McClure*, 6 Blackford 467, have been relied upon by counsel as conclusive against the rights sought by the bill in this cause. I have examined them with care and attention; the

two former decide, that a decree cannot be invalidated for mere irregularities, but both strongly intimate that if fraud had been shown the decrees would have been pronounced void and held for naught; the other was a case where a decree was rendered for certain land, and the person obtaining the decree was put into possession and sold the land to a *bona fide* purchaser for value before the decree was sought to be reversed; the title of the purchaser and those claiming under him was not affected by the subsequent reversal; the decree in that case was not attacked for fraud, and the question of course was not before the court.

In the case referred to by defendant's counsel, *Bassett* vs. *Nosworthy*, 2 Leading Cases in Equity, 65, the points decided were, that a purchaser *bona fide* without notice of defect in his title at the time of purchase, may lawfully buy in, a statute or mortgage, or any other incumbrance, and if he can defend himself at law by such incumbrances, bought in, his adversary shall never be aided in a court of equity, and that the title thus acquired was a good one, when no fraud or circumvention appeared in obtaining it. I take that to be good law, but there is no purchase in this case by the bona fide purchaser of incumbrances, and they stand entirely upon the sheriff's deed and the decree at Somerville. In the case of the forged will, the party loaning the money on the forged will protected himself by purchasing of a mortgagee, in whom was the legal estate so far as the purchaser had any notice, the court deciding no actual or constructive notice being given of payment of the mortgage, the law not requiring them to be recorded; but if the party had notice, he was not a bona fide purchaser, and consequently could not protect himself; see same, p. 70. The case of the commission of bankruptcy referred to, is not sufficiently full to determine the reasons given in the notes.

I have not been able to find a solitary case where a judgment or decree was obtained by fraud, but that the same was set aside, when fraud in obtaining it was shown. In *Sherville* vs. *Goodwyn*, 3 Humphreys, 430, it is laid down, a void judgment is no judgment, all persons acting under it are trespassers, and the case stands as if there had been no judgment at all.

In the case of *Kenedy* vs. *Daly*, 1 Schoales and Lefroy, the decree was set aside for fraud in obtaining it, though the defendant in the case was not an innocent purchaser. If a decree is void, it is a nullity as to both parties and all other persons, but if erroneous only, it has full effect till reversed or set aside.

Sales made under decrees which are erroneous, are in general valid, though the decree be afterwards reversed. 12 B. Monroe, *Medina's heirs* vs. *Medina*. Not so where the decree is void.

No one, I presume, will contend that a sale under a judgment or decree, void for want of jurisdiction, or because the party was dead against whom it was rendered, or that no process was served, would pass any title, either to the purchaser or any vendee under him. I can perceive no difference in the effect, though the manner of getting at the facts may be different. A judgment or decree rendered without jurisdiction by the court, may be collaterally attacked because it appears upon the face of the record. A decree or judgment procured by fraud, cannot be attacked generally collaterally because it does not appear upon the record. And under a void decree no one can protect themselves, except by long possession and acquiesence, which cannot be done in this case, as the complainant was an infant and is allowed three years by statute after coming of age, to show cause against the decree; and having commenced her action in that time,

The court will render a decree in conformity to the prayer of the bill.

NOTE.—This decree was affirmed by the Supreme Court of Tennessee, at April Term, 1859.

In the District Court of the United States, Eastern District of Pennsylvania, February 14, 1859.

RED BANK CO. *vs.* THE JOHN W. GANDY. TOWNSEND *vs.* THE EAGLE.

1. The rule of navigation is emphatically settled that a vessel with the wind free must give way to one close-hauled; and a steamboat having the control of her own movements by means of her motive power, is always treated as a vessel with the wind free.
2. The manœuvre of *fore-reaching*, even in a harbor, is not objectionable, unless there be some reason to apprehend a collision by reason of making it.

The opinion of the court was delivered by

KANE, J.—These cases have their origin in a collision, which took place on the 20th of June last, between the John W. Gandy, a coasting schooner, and the Eagle, a small steamer, that plies between Red Bank, on the New Jersey side of the Delaware, and Arch street wharf, stopping at South street wharf on the way.

The schooner was working down the river opposite the city, heavily laden with coal,—the tide in her favor, and the wind from the south or southwest. She had stretched across towards the foot of Chestnut street, close behind another schooner, and this vessel having just gone about, the Gandy was in the act of doing the same, when she encountered the steamer. The Eagle had left South street wharf for Arch street, and was keeping in as close to the town as she could, to escape the force of the tide, when perceiving the schooner approaching, and at a very short distance from her, she headed in still farther to avoid her, and reversing her engine for one or two revolutions so as to arrest her course; but she did not back until the collision had taken place.

The judge then recapitulated the questions raised upon the argument, and the allegations and proofs of the parties, respectively, and proceeded thus:

The nautical gentlemen who did me the kindness to hear the evidence with me, are of opinion that the conduct of the schooner was not at variance with the usages of navigation, and that the steamer ought to have prevented the collision. I think they agree with me upon all the points which were made between the parties:

1. The wind was light, according to some of the witnesses, baffling,

and its direction somewhat off the town, or so nearly parallel with the shore as to be affected, close on this side of the river, by the tall buildings on the wharves. A vessel, under these circumstances, approaching her ground for tacking, especially at the moment of passing under the lee of another vessel that had tacked just before her, might lose the wind from her forward sails, so as to appear to others about to luff, when she was not. This may perhaps, reconcile the conflicting testimony on the first point.

2. The position and character of the injuries sustained by the two vessels,—the steamer having her upper works torn away on the starboard quarter, and the schooner being damaged on the starboard of her stem,—proves conclusively, that the schooner had gone about, so far as to be heading down the river, when the collision took place.

3. The manœuvre of *fore-reaching*,—making a wide sweep in turning, so as to gain headway from the impetus she had acquired, instead of turning short,—is not objectionable, unless there is some reason to apprehend collision in consequence; and it is plain, as the schooner had gone about, that she would have nothing to fear on that score, if the steamer had been out of the way. And

4. The steamer ought not to have been there. The rule of navigation required her, as a vessel going free, to give way to the schooner, which was going close hauled; and it was her own choice which, with the open river at her side, and perfect control over her movements, had so placed her near the city shore, that she was unable to give way to vessels working down.

The occasion is, perhaps, a fitting one to renew the admonition to our steamers, that however important it may be to them, and convenient to the public, that they should keep up their speed, the law finds, in this consideration, no excuse for a collision whatever. They are, in this respect, on the same footing with the mail-coach, bound it may be by contract with the government, to *make quick time*, but not permitted on that account to infringe any of the rules of the road. It is the duty of every vessel to do all in her power to escape collision with another, and occurs very rarely indeed, in which the power of a steamer, properly fitted and managed, is not

adequate to prevent her encountering a sailing vessel. She is regarded in the regulations of the Trinity House, which have been adopted in this court, as a vessel with the wind free; but she is more than this. The force which moves her is governed by her own will. She determines for herself what shall be its direction and intensity at the moment; and she is at rest when the engineer commands. There is no hardship for her therefore, in the rule that requires her to give way to a sailing vessel, and the safety of navigation on our river, makes it a duty of this court to enforce it rigidly.

In the case before us, the libel against the John W. Gandy must be dismissed, with costs; and a decree must be entered against the steamer Eagle for the amount of damages sustained by the other vessel in the encounter, also with costs.

Decree accordingly, and reference to Mr. Commissioner Heazlitt, to assess the damages.

Mr. B. Gerhard, for the Eagle.

Mr. G. M. Wharton, for the Gandy.

In the Supreme Court of Pennsylvania. At Philadelphia, January, 1859.

MERCHANTS INSURANCE COMPANY OF PHILADELPHIA *vs.* ALGEO.[1]

1. A voyage that is insured, must be so conducted as not to change the risk insured against. If the usual mode, or the agreed mode of conducting it be changed, without a necessity *arising from a danger insured against*, the risk is changed.
2. When a party gets insurance on a voyage to be conducted in a prescribed mode, he must be understood as stipulating that that mode is practicable and shall be followed. If then the voyage in that mode is not practicable, at a certain stage of water, he has no insurance when attempting it at that stage.
3. The insured has no right to change the terms of the policy by choosing to start at a time that makes the change necessary. A change from necessity is one arising from a cause discovered after the commencement of the voyage.

Error to the District Court of Allegheny County.

This was an action of covenant by John Algeo & Co., against the Merchants Insurance Co., of Philadelphia, on a policy of insur-

[1] We are indebted to the Pittsburgh "Legal Journal" for this case.—*Eds. Amer. Law Register.*

ance, in $6,000, upon a cargo of ice, in four ice boats, from Freeport, Pa., to Nashville, Tenn., to be brought down to Pittsburgh by sweeps, and to be towed *thence* by steamer—being to amount of $1,500 on each boat, separate insurance.

On the 8th of April, 1856, the boats started from Freeport, and instead of being taken in tow at Pittsburgh, were run past that city and also past the Saw Mill Run landing, and to a point called the Pork House, at the lower end of Manchester, three miles below Pittsburgh, where, in attempting to land, one of the boats was lost. The reason given for not taking the tow at Pittsburgh, as required by the terms of the policy, was, that the stage of water was such (about 12 feet,) as to make it very hazardous to land the boats there for that purpose; and therefore, the resolution had been taken before leaving Freeport to run to the Pork House with the sweeps.

The defendants contended *inter alia*, that the terms of the policy relating to the mode of conducting the voyage from Freeport to Pittsburgh, and thence onward, constituted a warranty, and that plaintiffs, not having complied with the warranty, in the absence of valid excuse therefor, could not recover; that matters of excuse, for said non-compliance, must be such as arose after commencement of the risk; and that the plaintiffs having determined before the commencement of the voyage to land where they did land, the risk never attached.

The Court (Williams, P. J.) instructed differently, and the jury found for plaintiffs $1,688 and costs. Whereupon defendants took this writ of error, and assigned as error the refusal to charge in favor of defendant's positions as above stated.

Knox and *G. P. Hamilton*, for plaintiffs in error, cited Phillips on Insurance, sec. 750; *De Ham* vs. *Hartley*, 1 T. R. 243; *Blackhurst* vs. *Cockell*, 3 T. R. 360; 3 Dow, 255.

Marshall and *Brown*, for defendants in error, cited Phillips on Insurance, sec. 762, 770-1-3, 782, 119, 133; *Cochran* vs. *Fisher*, 1 C. M. & R. 809; *Eyres* vs. *Insurance Co.*, 5 W. & S. 116, 123.

Philadelphia, by

The opinion of the court was delivered January 3, 1859, at

LOWRIE, C. J.—A voyage that is insured must be so conducted

as not to change the risk insured against. If the usual mode, or the agreed mode to conducting it be changed without a necessity arising from a danger insured against, the risk is changed.

The agreed mode of conducting this voyage was changed by running the boats with sweeps to the lower end of Manchester, instead of to Pittsburgh. Did it appear that this change was necessary in order to escape a danger insured against? We think not.

When the plaintiffs below got insurance on a voyage to be conducted in a prescribed mode, we must understand them as stipulating that that mode was practicable and should be followed. If, therefore, the voyage in that mode was not practicable, with a twelve feet stage of water, they had no insurance when attempting it at that stage; and they passed Pittsburgh, not to escape a danger insured against, but because they started at a time when performance of the agreed conditions of the voyage were impracticable.

If the voyage in the agreed mode was, as we presume, practicable with any other stage of water, they were bound to start with such a stage, or give up their insurance by changing the risk agreed upon. Stopping at Pittsburgh and going in tow from that place, were essential parts of the voyage as agreed to be conducted, and this was prevented by intentionally starting with a stage of water that made it impracticable. The plaintiffs had no right to change the terms of the policy, by choosing to start at a time that made the change necessary. A change from necessity is one arising from a cause discovered after the commencement of the voyage.

In a short voyage like this (about four hours,) the plaintiffs are charged with knowledge of the difficulties of the navigation, and their own proof shows that they did know them, and that on account of them, they did not intend to stop at Pittsburgh. They started under a risk not insured against, and for this they changed the form of their voyage; and it follows, that the insurance never attached to this boat; and the plaintiffs might have been nonsuited on their own evidence. Under the circumstances of the case, the court ought to have affirmed the defendant's seventh proposition.

Judgment reversed, and a new trial awarded.

In the Supreme Court of Pennsylvania, 1859.

THE DELAWARE AND HUDSON CANAL COMPANY *vs.* JOHN TORREY.

1. It is a settled principle, that whenever any act injures another's rights and would be evidence in future in favor of a wrong-doer, an action may be maintained for an invasion of those rights; although there be no proof of any specific injury.
2. Hence, when saw-dust from the defendant's mill floated down into the plaintiff's basin, although it alone might not cause inconvenience to the plaintiff; but accompanied with saw-dust from other mills, the plaintiff's flowage was obstructed: it was held, that the defendant's deposit of any saw-dust was an actionable injury, inasmuch as it violated the plaintiff's rights.

This case came up on a writ of error to the Common Pleas of Wayne County.

The opinion of the court was delivered by

STRONG, J.—The first, second, third, and fifth assignments of error are substantially the same. The court was requested to instruct the jury that if the whole or any part of the saw dust made at the defendant's mill, came into the company's basin, and there intermingled with the other matter, obstructing the navigation, and making it necessary for the company to remove it, then the verdict should be for the plaintiff. This proposition the court refused to affirm, but on the contrary charged the jury that if they believed the saw dust from the defendant's mill alone, unaccompanied and unmixed with saw dust from other mills would not inconvenience the plaintiffs, they could not recover. Thus the jury were led to believe that the deposit of saw dust by the defendant in their basin was not sufficient to enable the plaintiffs to maintain an action, unless *it alone* caused a practical inconvenience and obstruction to the navigation. This we hold to have been erroneous, and the error was a radical one underlying the whole charge. It was repeated in various forms, and covered nearly the whole ground of contest in the case. The facts as developed by the evidence seem to leave no doubt that the dust from the defendant's mill, falling into the stream, was carried by the current through the feeder of the canal into the basin, and there deposited. The defence consisted mainly, not in a denial of this fact, but in there assertion that if there had not been intermingled with it saw dust culm and other substances from other mills, no

obstruction of the navigation would have been caused. In the way in which the learned judge put the case to the jury, they must have understood that if the facts were as contended by the defendant, there could be no recovery, that the dust from Mr. Torrey's mill alone must have been *of itself* an obstruction. If this is so, then the basin of the plaintiff might have been filled without any legal injury to them, for the contributors to the deposit might have been so numerous that the share contributed by each would be inappreciable. Or suppose there had been no other saw-mill on the stream than that of the defendant's. In a course of years that might have filled the basin with its dust, and yet the year's quantity deposited during any period of six might not *of itself* have caused any obstruction. If the doctrine avowed by the learned judge be correct, the wrong would be remediless. The court confounded the degree with the existence of the injury, or perhaps failed to distinguished between a wrong to the present enjoyment, and an injury to the right of enjoyment. The defendant cannot justify himself by showing that others were guilty of similar and concurrent wrongs. He had no right to cause any saw dust to be deposited in the plaintiff's basin. His first deposit, therefore, was an actionable injury, though it caused no practical inconvenience, because it was a violation of the plaintiff's right, and because continued deposition for twenty-one years would have given to him an easement, a right to continue it, as was ruled in *Wright* vs. *Williams*, 1 M. & W. 77, and as we held in *Jones* vs. *Crow*, a case decided at this term. The commencement of the acquisition of such an easement is with the first user, and of course, the first user is an invasion of the rights of the owner of the servient tenement.

That an injury to a right is actionable, though the damage be inappreciable, is settled by abundant authority. In a note to *Mellor* vs. *Spateman*, 1 Wm. Saunders, 346, Mr. Sergeant Williams says, "Whenever any act injures another's rights, and would be evidence in future in favor of the wrong doer, an action may be maintained for an invasion of the right without proof of any specific injury, and this seems to be a governing principle in cases of this kind, as in the case of *Patrick* vs. *Greenaway*, tried before Mr. J. Lawrence, at Oxford Spring Assizes, 1796, which was an action of

trespass for fishing in the plaintiffs several fishery; it appeared in evidence that the defendant fished, but did not take any fish, neither was it alleged in the declaration that the defendant caught any fish. The plaintiff obtained a verdict, which in the following term, Easter, 1796, the defendant moved to set aside; but the Court of Common Pleas refused even a rule to show cause upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would thereafter be evidence of the using and exercising the right by the defendant, if such an act were overlooked." This is expressive of the existing law in England, as announced in numerous cases. Upon this principle many actions are maintained for disturbance. So in *Young* vs. *Spencer*, 10 B. & C., 145. Lord Tenterden observed that "it seems to be clearly established that if any thing be done to destroy the evidence of title, an action is maintainable by the reversioner." The American authorities are almost uniform to the same effect. Thus in *Blanchard* vs. *Baker*, 8 Greenleaf, 253, which was an action for diverting water from a mill site, which had never been used, it was said by the court that a "mill privilege not yet occupied is valuable for the purpose to which it may be applied. It is a property which no one can have a legal right to impair or destroy by diverting from it the natural flow of the stream upon which its value depends. If an unlawful diversion is suffered for twenty years, it ripens into a right, which cannot be controverted. If the party injured cannot be allowed in the meantime to vindicate his right by action, it would depend upon the will of others whether he should be permitted or not to enjoy that species of property." Very many other cases to the same effect are collected by Mr. Angell in his Treatise on Water Courses, sec. 135, note 4, and section 428, et seq. The same doctrine is the acknowledged law of Pennsylvania, without reviewing the cases at length, it is sufficient to refer to the following: *Kirkham* vs. *Sharp*, 1 Whart. 233; *Williams* vs. *Esling*, 4 Barr, 486; *Pastorius* vs. *Fisher*, 1 Rawle, 27; *Ripka* vs. *Sergeant*, 7 W. & S. 9, and *Miller* vs. *Miller*, 9 Barr, 74. Instead, therefore, of having their attention turned to the inquiry whether the plaintiffs had suffered practical inconvenience from the act of the defendant alone, the jury should have been instructed that if the saw-dust from his mill fell

into the stream and was floated into the plaintiffs' basin and there deposited, the right of action was complete.

We think also that the court erred in saying to the jury that "the company were bound so to construct the canal, and so to use the water of the river Lackawana, if they could reasonably do so, as not to interfere with the rights of others, and if they could not, then to do as little injury as possible. Have they done so? Could that feeder and inlet to the basin have been so built as to have avoided the difficulty complained of, without burdening the company with an unnecessary expenditure of money or interfering with its usefulness? If it could, to that amount of care and caution they should be held." That was presenting to the jury an impertinent issue. If it be admitted that this was all correct in the abstract, what had it to do with the case? Did the court mean to say that if, without unreasonable or unnecessary expense, the canal and feeder could have been constructed so that the saw-dust from the defendant's mill could not have flowed into it, and was not so built; therefore, the defendant had a right to fill the basin with the refuse of his mill? Were the jury to inquire what expense was necessary or what would have interfered with the usefulness of the company? Were they to have determined what would have been the most fit engineering? The canal basin and feeder were completed about the year 1828. They have since been enlarged, but the location remains the same. They were constructed under authority of the State, and the damages were released by Jason Torrey, the father of the defendant, who then owned the lands upon which his saw mill was afterwards built in 1849, or 1850. When the canal and basin were completed it became not only the right but the duty of the plaintiffs to have them kept free from dust or other substances which might then or thereafter obstruct the navigation. If the works were unskillfully erected, without due regard to the rights of individuals, the law furnished a remedy; but it was not by granting permission to set off one tort against another.

The evidence, the admission of which is the subject of the sixth assignment of error, was doubtless inadvertently received. The court subsequently charged the jury that if the defendant could not enjoy a water power on his own premises without depriving others

above or below him of vested rights, he must cease to enjoy it, or answer in damages for the injury done. This ruling, undoubtedly correct, if applied to the evidence, would have excluded it.

The judgment is reversed and a venire de novo awarded.

In the Supreme Court of Pennsylvania, Eastern District.

COMMONWEALTH *vs.* WILLIAM H. JEANDELL.

1. Where an ordinary driver of a passenger railroad line is driving for hire for the company in the business of transporting passengers on and along the railway track on the Sabbath day, for the usual week-day fare, he is guilty of a breach of the peace.
2. The case of Commonwealth *vs.* Johnson, 10 Harris, 102; 2 American Law Register, 285 affirmed.
3. When worldly employment is carried on in such a manner and in such a place as to disturb the peace and religious exercises of the community, either at home or in churches, and cannot be restrained by the imposition of the penalty in the act, such circumstances constitute a breach of the peace.

Messrs. Porter and *Olmsted*, for the Commonwealth.

Messrs. Webster and *W. L. Hirst*, for defendant.

The facts of the case sufficiently appear in the opinion of the court which was delivered, (July 23, 1859,) by

THOMPSON, J.—The prisoner Jeandell was arrested on the 17th inst., by officer sergeant Orr, on instructions from the Mayor, while in the act of driving one of the cars of the Green and Coates street Passenger Railroad Company, filled with passengers, at Coates and Twenty-second street." The arrest took place about 1 o'clock P. M., of the day, and shortly after the starting of the car. He was one of the ordinary drivers of that line, and it is admitted was at the time driving for hire for the company, in the business of conveying passengers on and along the line of the company's road for the usual week-day fare. It appears from the letter of the President of the company to the Mayor, that it was the intention of the company to run their cars on the day mentioned under certain regulations, as to the rate of speed in passing churches, and by changing their bells for others making less noise. The Mayor having received the notice, thought it his duty to direct the arrest of those engaged in driving the cars, upon the grounds of a breach of the peace.

The evidence disclosed that the car was full of passengers, and it was testified that there was considerable noise and discussion on the subject of the rumored arrest, and the right of this line to run their cars on Sunday. It also appears that a pretty large concourse of people were collected at the depot of the company and at the place of the arrest, and that after the driver and conductor were arrested there was singing in the car. Evidence was heard without objection, on both sides, as to and upon the question of the alleged breach of the peace, and as to the noise made by those in the cars, and of the noise and disturbance made by the car itself. It appeared that cars had been run on and along this line the preceding Sunday, and several witnesses testified that it greatly disturbed the public worship in some of the churches along the line, as well as to private citizens. This evidence was proper as showing the extent of the disturbance, which, as far as the car had gone, was incident to the running on the day of the arrest, and what the extent would have been if continued. The witnesses for the Commonwealth were generally of opinion that the running of cars was a great disturbance of the peace and quiet of the Sabbath.

On the other side, it was claimed that the noise made by the car was only such as was incident to that mode of conveyance, and was not a disturbance to any inconvenient extent. And to this effect they examined several witnesses.

The question for determination now is, whether the prisoner is guilty of a breach of the peace, or *only* answerable for the penalty inflicted by the act of 22d of April, 1794, for performing worldly employment on the "Lord's Day, commonly called Sunday." If the latter, he must be discharged, but if guilty of the former he must be held to answer in the Quarter Sessions at its next term.

That driving a public conveyance for hire, is doing worldly employment within the provisions of this statute, cannot be doubted, since the decision of the court in the case of the *Commonwealth* vs. *Johnston*, 10 Har. 102. It was a similar case against an omnibus driver, on a line between Pittsburgh and Lawrenceville, and driving for pay, for the owner of the line; and it was determined by a majority of this court, that this was a violation of the act of Assembly of 1794. This statute was not the first in Pennsylvania on the

subject of Sunday. The statutes of 1705 and 1786 had existed prior thereto, but were in most particulars supplied by the act of 1794. The provisions of all of them seem to have had in view the same object, the prohibition of doing or performing worldly business on the Sabbath day, and establishing and maintaining it by positive civil enactment as a day of rest and repose. The penalty imposed by the act of 1794 for a breach of its provisions is the sum of *four dollars* for each and every offence, and in default of payment, imprisonment for six days. If I were determining the liability of this defendant, under the evidence, to the penalty of the act, I could not hesitate a moment to say he had incurred it, but I am not. A different question arising out of this act is the object of this inquiry; and that is, whether the defendant, in doing an act prohibited by law, did it in a manner to disturb the public peace. The existence of the penalty in the act, as a consequence of worldly employment on the Sabbath, is to be taken as a prohibition of the act, *Kepner* vs. *Keefer*, 6 Watts 233, Carthew p. 252. It has been decided, that one penalty covers the continued infractions of a whole day. It certainly cannot be contended, that every violation of that statute, is necessarily a breach of the peace. Work noiselessly and quietly done may disturb no one, and still the performer of it, if proceeded against, may have to pay the penalty, but would be answerable no further.

But when worldly employment is carried on in such a manner and in such places as to disturb the peace and the religious exercises of the community, either at home or in churches, or places of public worship, and it may not or cannot be restrained by the imposition of the defined penalty in the act, do not such circumstances constitute a breach of the public peace of the Sabbath, and may not the offender or the offenders be held to bail to keep the peace?

That work, thus publicly performed, might amount to a breach of the peace, seems to have been the opinion of Chief Justice Tilghman. In the case of *Commonwealth* vs. *Eyre*, 1 S. & R. 347, he said, "the violation of the Sabbath is a crime which deserves punishment. But when the work done is without *noise* or *disorder*, there is nothing in it like actual breach of the peace."

Similar language was held by Justice Yates in the same case.

The converse of the proposition is clearly deducible from the statement of it in the terms used.

In *Dupuy* vs. *Commonwealth*, Brightly's Rep. 44, Kennedy J. sitting at nisi prius, said that "doing unnecessary work, so as to disturb the worship of others, is indictable." If arrested and held to answer for this, the prisoner would be held to good behavior in the meantime. So in *Teaman* vs. *Commonwealth*, 1 Phil. Rep. 460. It was an attempt to hold to bail a news-vendor for crying and selling his papers on Sunday. On the hearing, Judge Thompson said: "The crying of newspapers in the public streets on Sunday *is a breach of the peace.* As well might the oysterman cry his oysters, or the charcoal man ring his bell. The peace of Sunday may be disturbed by acts which on other days cannot be complained of; such acts as interfere with the rights which the law vouchsafes to the public who desire to observe that day as a period of religious observance and rest from worldly business. In regard to this question, I concur in the doctrine that the law gives to the public the right of enjoying the Sabbath as a day of rest and of religious exercises, free and clear of all disturbance from merely unnecessary and unallowed worldly employment.

That where the law is contravened in such a manner as to disturb that enjoyment by noise or disturbance accompanying it, or incident to it, it is a breach of the peace."

The prisoner was discharged, and the reason stated by the learned judge in the remark, that "if it had appeared that any person complained of being *disturbed by the defendant*, or that any one was accosted by him for the purpose of selling his papers, such a complaint would have rendered the defendant liable to the charge now made," surety of the peace, as I understand the case.

These opinions show, as far as they go, the inclination of the minds of judges of learning and experience that it may be treated as a breach of the peace. In this I do not mean the disturbance of conscience, constructive disturbance, but actual, occurring so long or so frequently and in such a place as to amount to a public disturbance. The reason the law holds it to be such is, that the occurrence cannot be prevented otherwise than by treating it as such

and it is so treated to prevent violent remedies to redress a wrong. If we must wait until breaches of the peace, in the ordinary and week-day sense of the term, occur before we interpose a preventive remedy, then is the mischief done and the breach of the public peace aggravated.

If the running of the cars on the passenger railroads is a disturbance of the public peace of the Sabbath, and the rights of worship and of rest, by reason of the noise accompanying them, and they are not restrainable by reason of the inefficiency of existing laws, and must be permitted to continue because they have not produced actual resistance and collision on the part of or with those who oppose such a course, they even will not in all probability long be wanting, and we may have the realization of what the unlawful act has a tendency to produce, breaches of the peace of a more unmistakable character. It was the duty of the conservators of the peace to prevent this offence.

The history of mankind shows that there is nothing about which they will move more zealously, and fiercely struggle, than against encroachment on rights of conscience or conscientious exercises.

The defendant here acted, in driving the car in question, by direction of his employers, who well knew that they were violating an act of assembly—for the law was plain and the decree on it recent. They acted in violation of it, not through any principle of necessity or supposed necessity, but simply for gain, as the evidence clearly shows; and the prisoner was bound to know the law, and does not deny that he knew the purpose. His driving the car at the time of the arrest was accompanied by noise, sufficient, as the testimony shows, at the time and by the experience of the preceding Sabbath, to greatly interfere with public worship, and disturb the public along the line, and was accompanied by a crowd of persons and some disorderly conduct, if the witnesses are to be believed. I think this constituted a breach of the peace of the Sabbath, as ordained and established by the act of 1794, and that under the circumstances an arrest was proper.

Traveling or riding for recreation even, is not a breach of the Sabbath, and persons may not be arrested for riding along the

streets for such purposes. The disturbance, if any, occasioned by the vehicle would be but for an instant, and not be soon recurring. That is very unlike, in character, the carrying of passengers in a vehicle along the same route every six minutes, as was intended by the company on the day the arrest was made; nor do I believe in the right to arrest for any worldly business, unless in cases where the business done does actually disturb the peace of the neighborhood. Then it amounts to a different offence from that for which the penalty of the act of 1794 is provided. And this is all that it may be necessary to say in answer to the attempted application of the act of 1806 to the case in hand.

The act provides that where a statute enjoins anything to be done, in a particular way, or affixes a penalty to the doing of an act, the remedy of the statute should be followed, and no other. The penalty imposed by the act of 1794 is for the performance of worldly employment—a punishment for the act. The offence complained of here is the disturbance of the public peace, and the worldly employment, the kind and manner of it, is only evidence of the offence charged. It is not covered by the act of 1794.

Although Christians of all denominations look upon the institution of the Sabbath as of divine origin, yet it requires statutes to protect its observance, and the act of 1794, so often referred to, was undoubtedly passed for that purpose. It established what might be called the *peace of the Sabbath.* The public have the right to the benefit of the law. If actually disturbed, they can only be redressed by arresting the disturbance; compensation for it does not remove the evil. If no arrest can be made for the disturbance incident to or caused by the worldly pursuits of individuals, then it will follow that whenever it is more profitable to carry on business by paying the penalty of *four dollars* than to abstain from it, there will be found persons in the community ready, publicly and regardless of the peace of society, to engage in it. In short, *four dollars* will be a license fee for the right to carry on the most noisy employment, it may be, in the most public places on the Sabbath day, instead of a penalty, to secure its observance. If our railroad companies may run by paying the penalty, all may run, and all the

omnibuses, drays and carts in the city on the same terms. Where would be the peace and quiet of the Sabbath in such an event as this? These views do not make the law; they illustrate the reasonableness and propriety of the remedy applied.

This city has for one hundred and fifty years obeyed the law faithfully in its observance of the Sabbath day, and it is not perceptible wherein either its prosperity or character has suffered. If it is likely to do so, those most interested must apply to the law-making power of the commonwealth if they wish to exercise privileges at present withheld and prohibited. Railway corporations have accepted their charters under this law as well as other laws of the land, and should not be the first to grasp at powers not given them in the exercise of these highly profitable and beneficial franchises, bestowed on them by the liberality of the State. That the prisoner is in custody through the instigation of the passenger railway company for which he was driving, is not denied. He was their servant *pro hac vice*, and the discussion of his rights was greatly made to depend on the rights of his employers.

They were not ignorantly violating the laws in directing the running of their cars, nor is it insisted that the prisoner was, nor was it insisted that the violation was to be but a solitary trip, or a day. It was rather to be the inauguration of a new era, resting itself not so much on the laws of our own happy land, but the examples of "progress," "liberal sentiments," "modifications to suit the wants of the age," of other countries possessing neither our own morality, virtue, freedom, or independence.

These considerations were no more reasons operating on my mind in looking to conclusions, than any extreme sentiments upon the other side, which would regard all peaceful recreations on the Sabbath day as violations of God's law, and therefore necessarily of men's.

The conclusion I have come to is to refuse the discharge of this man. I no further decide upon this case than to refuse his discharge, and let the law hand him over to his proper judges at the proper time. They will decide what is best to be done when they shall have heard all the testimony in the case. They have ample

powers to hold him if he is a disturber of the peace, to give security to keep it, and to be of good behaviour, as they shall think right. I am satisfied that the conclusions I have arrived at are sustained by law, and are conducive to the peace and best interests of this community.

I have so far taken no notice of the fact that the prisoner commenced running the cars at or about one o'clock of the day, and that he was instructed to move slowly by the churches on the route. The rights of the people to the quiet of the entire day must not be made dependent upon the caution with which it is violated.

If it amounts to a disturbance, it is a breach of the peace, and if the public are entitled to an undisturbed portion of the day, they are to the whole of it. Nor was it the right of the prisoner, or his employers, to assume that the people will perform those religious exercises before one o'clock P. M., or risk disturbance.

They are neither to be constrained in the form of worship, time of worship, nor to engage in it at all, by any power, much less by conventional regulations to which they are no parties. Freedom on this point is a guarantee of the constitution.

Discharge refused and the prisoner remanded, but he may now enter into recognizance with security to appear at the next Quarter Sessions.

RECENT ENGLISH DECISIONS.

In the Court of Exchequer.

SOLOMON *vs.* THE VINTNERS' COMPANY.[1]

1. Plaintiff owned a house, adjoining it was a house of a third person, and adjoining this third person's house were two houses of defendants. The four houses for more than thirty years past were all of them out of the perpendicular, leaning to the west. Defendants contracted to have their houses (which were the most westward) pulled down, and others erected in their places. The contractor pulled them down, and by so doing the plaintiff's house fell and did damage: *Held*, that the plaintiff had not established his claim to a right of support for his house, and enjoyed as of right from the defendants through the medium of the plaintiff's house being supported by the intermediate house which leaned upon the defendants'.

[1] London "Law Times."

The plaintiff was the owner and occupier of a house in Pilgrim street, Ludgate-hill, London. It was built on a hill, and had a slight descend towards the west; adjoining to and next below the plaintiff's was another house belonging to a third person, and next adjoining to this were two houses belonging to the defendants, one of their houses being a corner house of the street, the other in the adjoining street. For more than thirty years the four houses were all of them out of the perpendicular, leaning to the west. It did not appear when the houses were built, or that there was any connection between them in title or otherwise. The lease granted by the defendants of their houses expired in 1857. They contracted with one Mr. Robins to pull them down, erect two others in their place, and to grant him a lease of them. Robins pulled them down, and in consequence the plaintiff's fell, doing considerable damage. The plaintiff then brought this action against the defendants to recover from them for the injury and for the loss he had sustained. At the trial before Martin, B., in London, the plaintiff was nonsuited, with leave reserved to enter a verdict as the court should direct, the court to have power to make any amendment in the declaration that may be necessary to impose liability upon the defendants, if it could be imposed; or, if they were not liable upon the evidence, the court to direct accordingly; or, if the court thought defendants were liable, the question of damages to be referred to an arbitrator as the court may appoint. A rule *nisi* having been obtained accordingly,

Edwin James, Q. C., *Hawkins*, Q. C., and *D. D. Keane*, showed cause for defendants.

Blackburn and *Honyman*, contra, for plaintiff.

The following cases were referred to:—Baten's case, 9 Coke, 54 a; *Brown* vs. *Windsor*, 1 Cr. & J. 20; *Rex* vs. *Rosewell*, 2 Salk. 459; *Chauntler* vs. *Robinson*, 4 Ex. 163; *Thompson* vs. *Gibson*, 7 M. & W. 456; *Palmer* vs. *Fletcher*, 1 Siderfin, 167; *Stansell* vs. *Jodrell*, 1 Sel. N. P. 457; *Hide* vs. *Thornborough*, 2 Car. & K. 250; *Rowbottom* vs. *Wilson*, 8 E. & B. 120; Gale on Easements, p. 234, "Negligence," p. 307, "Obligation to repair;"

Humphreys vs. *Brogden*, 12 Q. B. 739; *Richards* vs. *Rose*, 9 Ex. 218; *Pye* vs. *Carter*, 1 H. & N. 916; *Gayford* vs. *Nicholls*, 9 Ex. 702; *Nicklin* vs. *Williams*, 10 Ex. 259; *Chadwick* vs. *Trower*, 3 Bing. N. C. 334.

Cur. adv. vult.

POLLOCK, C. B., delivered judgment.—I have to deliver the judgment of myself, my brother Martin, and my brother Channell. My brother Bramwell does not differ in the result, but I believe he will express his own views on shorter grounds. He agrees with the judgment of the court, but does not adopt all the reasons which I am about to mention. This was an action tried before my brother Martin at Guildhall, at the sittings after last Hilary Term. The plaintiff complained of an injury occasioned to his dwelling house by the taking down and removal of two houses, the defendants' property, under the circumstances after mentioned. The facts proved at the trial were these:—The plaintiff was the owner of a house in Pilgrim street, in the city of London. His house was built on a hill, having a descent towards the west; there was a house next below his, and adjoining to the plaintiff's house, belonging to a third person, and the defendants were the owners of the two houses next adjoining. One of the defendants' houses was a corner house of the street, and the other was in the adjoining street. For upwards of thirty years the four houses were all of them out of the perpendicular, leaning to the west, and this might have been seen by any one passing by. There was no evidence how or when this occurred, or when the houses were built, or that there was any connection between the houses, either in title, occupation, possession or otherwise. In 1857 the lease of the defendants' houses expired, and they entered into a contract with a person of the name of Robins, that he should pull them down and erect two other houses in their place, and that, on this being done, they would grant him a lease upon an agreed rent. Robins proceeded to pull down the houses, and, in consequence, damage was caused to the plaintiff's house; and the question is, whether these facts show any liability on the part of the defendants. For the purpose of the argument, it is to be assumed that Robins acted with

negligence. The defendants contended that the facts before stated afforded no evidence that the plaintiff had acquired, or had, as alleged by his declaration, a right to have his house in any way supported by the houses of the defendants, and that they were not liable for the negligence of Robins, their contractor, in taking them down under the contract referred to. The plaintiff, on the other hand, contended that, upon the facts proved, he had acquired a right to the support of the defendants' houses; but if the defendants, by themselves or their servant, had taken the houses down and deprived the plaintiff of the support thereof, the very act of removing the support to which he was entitled, however carefully done, had entitled him to maintain an action against the defendants, and that the taking down was an act done by Robins by their authority and direction, and was the same as if it had been done by themselves. It was admitted by the learned counsel for the plaintiff that, on the existing authorities, the defendants would not be responsible for the mere negligence of Robins. My brother Martin, at the trial, was of opinion, that the defendants were not liable, and directed a nonsuit, with leave to the plaintiff to move to enter the verdict for him, in which event it was agreed that all further questions should be referred to an arbitrator. A rule was accordingly obtained, which came on for argument in the course of the last term. It seems now to be well settled that the right of one man's land to support from the adjoining land is not an easement, or in the nature of an easement at all; but a natural right to the flow of the water that a natural river ought to have; *Rowbottom* vs. *Wilson*, 8 E. & B. 123. But the right to support for one building from an adjoining building is certainly not a natural right. It may arise in different ways. In *Partridge* vs. *Scott*, 7 M. & W. 220, Alderson, B., in delivering the judgment of the court with regard to a right very analogous, says that rights of this sort, if they can be established at all, must have their origin in grant. In *Peyton* vs. *The Mayor of London*, 9 B. & C. 736, Lord Tenderton intimated that, if it appeared that both houses were originally built by the same owner, the right to support might exist. In *Richards* vs. *Rose*, 9 Ex. 218, this court held that in the latter case

such a right did exist. Such a right or easement was recognized by the civil law. If the house removed had been the next adjoining the plaintiff's, we should have felt much embarrassed by some cases and *dicta*. In *Stansell* vs. *Jodrell*, Selwyn's N. P., and *Hide* vs. *Thornborough*, such a right of support is stated to be gained, if the houses have stood for twenty years; and in *Humphries* vs. *Brogden*, 12 Q. B. 749, Lord Campbell refers to these cases. It is extremely difficult to see how the circumstance of the houses having stood for twenty years makes any difference or creates a right. Where houses are supposed to have been built by different adjoining landowners, each with its own separate and independent walls, but that upwards of twenty years ago one of them got out of the perpendicular, and leaned upon, and was supported in part by the other, so that, if the latter were removed the other would fall, the question is, whether any right of support is thereby obtained? It cannot be a right of prescription, which supposes a state of things existing before the time of legal memory; nor does it seem to us to be a right under the Prescription Act, 2 & 3 Will. 4, c. 71, which has been hitherto confined to rights in their nature of a perpetual and permanent character, and the ownership of which is a fee-simple. It seems to us, that in the absence of all evidence as to origin or grant, the only way in which such a right can be supported is that suggested by Lord Campbell in *Humphries* vs. *Brogden*, namely, an absolute rule of law similar to that which is stated to have existed in the civil law. But there is no authority for any such rule to be found; at least, none was stated before us. Lord Campbell compares it to a right to lights. But this right is created by the express enactment of the 3d section of the statute before referred to, and it does seem contrary to justice and reason that a man, by building a weak house adjoining to his neighbors, can, if that weak house at all gets out of the perpendicular and leans upon the adjoining house, thereby compel his neighbor either to pull down his own house within twenty years so as to prevent a right from being acquired by twenty years' enjoyment, or to bring some action at law, the precise nature of which is not very clear, otherwise, it is said an adverse right would be acquired against him.

But these questions we refer to because they were matters of argument at the bar; it is not necessary to decide them in the present case. The defendants' houses were not next adjoining the plaintiff's, there was an intermediate one; and it is necessary to consider whether any of the grounds suggested as creating a right are supported by the evidence. As to any right arising from the non-removal of the defendants' houses, assuming it to be that a man who has a house suitable for his own purpose, must pull it down within twenty years, otherwise his neighbor, whose house may lean upon it, would have gained an adverse right of support, the evidence is defective; for it is plain, that during much the greater part of the thirty years during which the houses were out of the perpendicular, the defendants' houses were in the possession of tenants under leases; the defendants could not have pulled them down if they had been disposed so to do. But it was strongly argued that the defendants might have maintained an action against the plaintiff during the first twenty years of the leaning of his house upon theirs. When a house built upon the edge of a man's land gets out of the perpendicular, and leans or hangs over his neighbor's land, it no doubt occupies a space belonging to his neighbor—the rule of law being *cujus est solum ejus est usque ad cœlum*. But, assuming the neighbor could maintain an action to recover the space, or for interfering with it, the defendants could not have maintained such an action for the plaintiff's use of this projection over the defendants' soil, while it projected over the soil of intervening owners. It was said, however, that prior to the 1st June, 1837, now twenty-five years ago, a writ of *quod permittat* might have been brought; but even if this were so, it would be of no avail, for during fourteen of the twenty years this action has been abolished. It was said that, since then an action on the case might have been brought; but we apprehend that upon the evidence in this case the defendants could have maintained no such action. There was no evidence how the leaning originated. It may well have been that the defendants' houses were the first to give way, and that this was caused by some excavation in the street, for which they were in no wise responsible; and that the getting out of the perpendicular of the plaintiff's

house originated from the same cause. Under such circumstances we think the defendants could not have maintained an action on the case against the plaintiff. If the only evidence had been that, in this case, we entertain no doubt the judge would have been bound to have held that there was no evidence to go to the jury. The question, therefore, really comes to this, is there any authority in the law for the existence of such a right as that claimed by the plaintiff? We find none where the houses do not adjoin, and although we possibly might have acted upon those cases in Selwyn's work on Nisi Prius before referred to, if the circumstances had been the same, we are not disposed to extend the principle further than we feel ourselves compelled by authority. If there be such a rule of law as that suggested by Lord Campbell in *Humphries* vs. *Brogden*, the plaintiff's contention may be right, as already observed; we have not been referred to, and are not aware of, the authority. It is also suggested that the right to light is conferred by the enactment of the Legislature, and not by common law. The rule, therefore, to set aside the nonsuit will be discharged.

BRAMWELL, B.—I think that the rule ought to be discharged, and I do not dissent from any reason given by my Lord for discharging the rule. But the reasons there given seem to me to involve questions of very great difficulty and importance, and I would rather not pronounce an opinion on them without a great deal more consideration than I have been able to give them. I certainly would not do it in any case without some necessity for so doing, which I do not see here; because I see there is ground upon which the defendants are clearly entitled to our judgment, and it is this: where a house leans as this does, the owner of it may make two claims in respect of it upon his neighbor—one, a general right to impend and occupy a portion of his ground as it were, and to hang over and occupy a portion of air over it—the space over it; another right would be a right to support from the walls of the house of the neighbor. Now, the former claim is here out of the question, because it does not impend over the defendants' land—the plaintiff's house did not. Therefore the question is limited to the latter; and accordingly Mr. Blackburn's contention was, that the

plaintiff had a right of support for his house through the medium of its being supported by the intermediate house, which leaned upon the defendants', as he said. Well, now the right, as I understand, was this: it was a right to have the support while the defendants' house stood there; it was a right to have the defendants' house continue to stand there to give that support; and it was a right, when the defendants' house would no longer stand of itself, on the part of the plaintiff to go on and repair it, and make it sufficient to bear the weight of the plaintiff's house. Now, that is a claim which, to my mind, is extravagant upon the very enunciation of it; but, for aught I know, it is one which may exist in point of law. Supposing it does exist as a matter of absolute right, or supposing it to exist as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant—in any of these cases it can only exist if the benefit which is claimed was one that was enjoyed as of right. Now, a thing cannot be enjoyed as of right, unless it is openly and visibly enjoyed. An enjoyment must neither be *in precario* nor *clam;* it must be open. Now, when you see one house leaning towards another, you may make a tolerably shrewd guess that it is partly supported by the other; but it is but a guess. You cannot tell. It may be that they have both slipped, and both stand, I think the expression is—upon the square—self-supporting; and it may turn out, and it may be the fact, that the house which leans towards the other affords as much support to that other, by the two being joined or sticking together in some way or another, as the other affords to it. One cannot tell, upon the face of it, that it is being supported. Well, it is true, as in this case, that that result has flowed as was said, because, when the defendants' house was removed, down came the plaintiff's; and, probably, nobody who saw the whole concern, would have guessed it was so. But it would have been but a matter of judgment, and therefore, to my mind, supposing that the plaintiff for more than twenty years had an enjoyment, which, he says, now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right. It appears to me, therefore, that on that ground there has been nowhere that which is called adverse enjoyment, or enjoyment as of

right, and that which Mr. Blackburn claimed for his client; consequently, that no title was gained under any of the different ways in which it has been surmised it might have been gained. It seems to me on that ground, (of course I bear in mind that there is an intermediate house,) the defendants are entitled to our judgment.

MARTIN, B.—If I had been one of the jury, I should have found a verdict for the defendants on the ground stated by my brother Bramwell. I think it was a question for the jury clearly. As I have already said, it strikes me, if that is the correct view of the case, it was a question for the jury, and not one of law.

Rule discharged.

Court of Exchequer.—Trinity Term.—June 4.

DUCKWORTH, ADMINISTRATOR, *v.* JOHNSON.[1]

1. In order to maintain an action under the 9 and 10 Vict. c. 93, actual damage must have accrued from the death of the deceased. Proof of the death and relationship of the parties does not give a right to nominal damages.
2. In an action under that statue by a father for the death of his son, it was shown that the deceased earned a certain weekly sum, which he brought into the general stock of the family:—Quære, whether, in order to maintain the action, the plaintiff should have given evidence that the weekly expense of keeping the deceased did not exceed that amount?

This was an action to recover damages under the 9 and 10 Vict. c. 93.[2] The declaration alleged that the plaintiff was administrator of one J. Duckworth; that a certain wall of the defendant fell on the deceased and caused his death, whereby the plaintiff was put to great expense, and the plaintiff and the mother of the deceased were deprived of and lost much pecuniary and other assistance, and sustained pecuniary loss. To this the defendant pleaded not guilty, and at the trial a plea was added denying that the plaintiff and the mother of the deceased were deprived of or lost any pecuniary or other assistance, or sustained any pecuniary loss. At the trial, be-

[1] London Jurist.

[2] Many of the States have enacted this English act with some modifications. See 1 Tidd's Pract., Amer. ed.—*Eds. Am. L. Reg.*

fore Byles, J., it appeared that the plaintiff was a mason, and until some time previous to the accident lived at Manchester, whence he removed to Liverpool to get work, leaving his wife and children at Manchester. A short time before the accident he returned, and took the deceased over with him to Liverpool. A few days after this he sent the deceased, a lad about fourteen, on a message, who, while returning, had occasion to pass by some premises of the defendant, the wall of which, being in an unsafe state, fell upon and killed him. It was conceded that this unsafe state of the wall arose from the negligence of the defendant. For about two years and a half, up to a few days previous to his death, the deceased had been at work in a mill, where he earned 4*s.* a week, which he brought home to his parents to contribute to the general support of the family. No evidence was offered to show to how much his keep amounted; but it appeared that the family consisted of eight in number, and that the father earned 30*s.* a week. On this state of facts it was objected that no such loss or damage was shown to have resulted from the death of the intestate as entitled the plaintiff to maintain the present action, or, if the action did lie, to recover more than nominal damages. The judge, however, left the case to the jury, telling them that they must give damages only for pecuniary loss, and not for wounded feelings, reserving leave to the defendant to move to enter a verdict or reduce the verdict to nominal damages. The jury having found for the plaintiff, damages 20*l.*,

Atherton obtained a rule accordingly, which was argued during this term, on the 3d June.

Edward James, *Milward*, and *M'Cullagh* showed cause.—The action is maintainable for nominal damages, even supposing no actual damage proved. This appears from the language of the 9 & 10 Vict. c. 93, s. 1—"Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, &c." In

the present case the wrongful act is not disputed, and there can be no doubt if the deceased had survived the injury done him, he might have maintained an action for it. [*Pollock*, C. B.—You read the statute too generally. The recital is—"Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person; and it is *oftentimes*" (not *always*) "right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him; be it enacted &c." I think that means, that an action is to be maintainable if actual damage has arisen, not otherwise. *Bramwell*, B.—The second section says, that "in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." All that contemplates that there must be something to divide.] Where the construction of a statute is ambiguous, recourse may be had to its recitals; not so where there is no ambiguity. But if actual damage is necessary, there was evidence here to justify the finding of the jury. In *Franklin* v. *The South-eastern Railway Company*, 3 H. & Norm, 211; 4 Jur., N. S., 564, this court laid down, that in an action under this statute the damages should be calculated with reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased. In that case the plaintiff was an old man getting infirm, who lived in the lodge of an hospital, and was employed to carry coals round the wards, for which he was paid 3*s.* 6*d.* a week—whether under a contract or by way of gratuity did not clearly appear. The deceased, the son of the plaintiff, was a young man earning good wages, who did not live with the plaintiff, but was in the habit of gratuitously assisting him, by carrying the coals round the wards for him; but the plaintiff, not being in need, was not supported by him in any other way; and it was held that the plaintiff had such reasonable expectation of

pecuniary benefit from the continuance of his son's life as would enable him to maintain the action. And that doctrine was recognized and confirmed in *Dalton* v. *The South-eastern Railway Company*, 4 Jur. N. S., 227. There the son, who earned good wages, had been in the habit for several years of contributing to the support of his parents, who were in humble circumstances, by making them frequently small presents of grocery, and by becoming responsible for the supply of some butcher's meat. [They also referred to *Bramall* v. *Lees*, 29 Law T. 111.] [*Bramwell*, B.—A Canadian judge once told me that this statute gave them more trouble at Toronto than any other, for they did not know how to act on it. It is easy to say that it is absurd in the law to allow an action to be maintained when the party lives after an injury, but not if he dies from its effects; but then we should remember that the wrongdoer is not called on to pay the dead man anything; the statute compels him to pay damages to a different set of persons altogether.] Here was ample evidence of reasonable expectation of benefit to the plaintiff from the continuance of the life of the deceased, who for a long time brought him 4*s.* a week. It will be objected that there was no evidence to show that the keep of the boy did not exceed that sum; but 2*s.* 6*d.* a week is the allowance made for the keep of a boy under the poor laws.

Atherton, in support of the rule.—It is clearly established, that in actions under this statute damages must not be given by way of solatium. *Blake* vs. *The Midland Railway Company*, 18 Q. B. 93, and the cases that have been cited, show that damages must not be given by mere guess, but be founded on a *reasonable* expectation of benefit to the plaintiff from the life of the deceased. In *Bramall* vs. *Lees*, there was evidence that in a short time the child would have got work; while in *Franklin* vs. *The South-eastern Railway Company*, and *Dalton* vs. *The South-eastern Railway Company*, the son was an adult, self-supporting, and having actually rendered assistance to the parent. In the present case there was no reasonable evidence of the deceased having been a benefit to his parents, and there was no more prospect that he ever would be so, than that any other child would be. Except

in the case of an actual idiot, there is a *possibility* of success in life for *any* child, even for a child just born. The fortunes of Whittington may be in store for any child; but even then remains the question, whether he will dedicate himself to the support of his parents in their old age, should they require it. Besides, there was no evidence here to show that the money earned by the boy exceeded the amount of his keep; add to which, that shortly before the accident he had ceased to earn anything. *Cur. adv. vult.*

Judgment was now delivered as follows:[1]

POLLOCK, C. B.—The question in this case, which is an action brought under Lord Campbell's Act, the 9 & 10 Vict. c. 93, is, whether the plaintiff has sustained damage in consequence of the death of his son; it being admitted on all hands, that, in order to maintain such an action, the damage sustained must be of a pecuniary nature; and although no very strict rule has been applied to the question, I think it must be taken as decided that a father cannot be considered as having a pecuniary interest in the life of his child, in consequence of expenses incurred by his maintenance and education. In the present case it appears that the father of the boy had come to the place where the accident happened, a few days before it happened. It appeared also that the boy was about fourteen years of age, and for about two years and a half had been working at an occupation which he had lately quitted, and while working had earned 4*s.* a week; and the question is, whether that amount of means derived from the services of the boy gave the father a pecuniary interest in him; for it was shown that the amount of his earnings was always brought into what one may call the common stock of the family. There was, indeed, no distinct evidence with respect to what actual expense the father was at in maintaining and clothing the boy; and I think that that was a question upon which the jury were probably much better judges than any of us could be, and could deal with it much better than they could deal with a question of law. They have found a verdict for the plaintiff, with 20*l.* damages, and the question is, whether a verdict is to be entered for the defendant, on the ground

[1] The judgments in this case are given ex ralatione.

that the action cannot be maintained at all, or, supposing that it can, whether the verdict is to be entered for nominal damages, upon the ground that there was a right of action in the plaintiff, although no actual damage was received. I own that, looking at the act of Parliament, my impression is, that if there was no actual damage, the action is not maintainable—it appears to me that the act intended to give a compensation for damage sustained, and not for some imaginary damage, in virtue of which the plaintiff might sue the persons who were either negligent, and so caused the mischief, or who were responsible for some other person who caused it by his negligence, with the view, in either case, of punishing the defendant by compelling him to pay, although no damage was sustained. That disposes of the question of entering the verdict for nominal damages. Then comes the second point. The jury have found that the plaintiff sustained damage to the extent of 20*l.*, and the question is whether, under the circumstances, we should be justified in setting the verdict aside, and entering a verdict for the defendant. I am of opinion that we cannot do that. I think there was evidence, which in all probability satisfied the jury, that quite apart from any questions of affection or family comfort, or the pleasure which a father would take in the prospects of a boy who was said to be of lively parts, and considerable industry and activity—apart, I say, from all that, it is exceedingly likely, viewing the question as a matter of profit and loss, that the father would not have taken 20*l.* for the services of his son. It is very true, no distinct evidence of that was given, and it would, perhaps, be difficult to give very clear and accurate evidence upon such a subject; but I think it may well have been that there was some balance of advantage from the boy every week; and if so, then, in the course of the fifty-two weeks of which the year is composed, that weekly balance might amount to a sum which the father could say was more to him than 20*l.* It having been now clearly decided, that in actions like the present, if there really was a prospect of benefit to the parent or the executor from the deceased, the jury will take that into consideration in estimating the damages, I think that with regard to a boy in the con-

dition in which this boy was, and in reference to what he had done during the last two years and a half of his life, it is impossible for us to say that the jury were not warranted in giving a verdict for the amount they have given. Under these circumstances we can neither enter the verdict for nominal damages, nor for the defendant; and the result is, therefore, that the present rule must be discharged.

MARTIN, B.—I am entirely of the same opinion. I am quite clear that we cannot enter a verdict for the defendant; for the evidence was, that for about two years and a half before the accident, this boy earned 4*s*. a week, although he was not in any employment at the time of his death, having come from Manchester to Liverpool to live with his parent at the latter place. Under these circumstances, how is it possible for us to say that there was not evidence of pecuniary damage to the plaintiff from the death of the boy? And that seems likewise to be an answer to the other branch of the rule; for we cannot say that there was nothing but nominal damage here; for if there was evidence of pecuniary loss to go to the jury, they had a right to say what was the amount of it. Then it is said that it ought to have been proved that the cost of feeding, clothing, and lodging the deceased did not exceed 4*s*. a week; but I think that is a matter for the jury to determine. One family costs more than another to maintain. It is impossible to reduce such matters to a scale; and certainly if, under the circumstances of the present case, actual damages were to be given, I think 20*l*. is not too much.

BRAMWELL, B.—I am of the same opinion. The doubt I had in this case was, whether evidence of the nature mentioned by my Brother Martin should not have been given; and I still have great difficulty upon that subject, because it seems to me, that although the jury are at liberty to judge of the damages, still, if they are to give damages upon evidence like this in every case where a child, of whatever age, is killed, all sorts of matters will be flung at the heads of the jury; you may exhort them, and do all you can to prevent their giving any damages by way of solatium, but they will do it; whereas if the plaintiff was compelled to call witnesses, who

could say, "I know the value of the services of such a child, I know the addition he would make to the family fund, and I also know what the cost of keeping him would be," it might possibly keep the matter straight, and prevent injustice being done. I have, I own, considerable difficulty on this point, but I am quite reconciled to discharging the present rule, on the ground that I do not think that this specific objection was taken at the trial. Under the circumstances we must assume this child to have been a beneficial child, if I may so say, to the father; and, in truth, I think it very likely that the father derived benefit from him. But I am by no means clear that in every case it is for the jury to say, on such evidence as this, that there was a beneficial interest in the father. On the contrary, I am inclined to think that further evidence on that subject ought to be laid before them. Suppose the deceased earned 10*s*. a week when in Ireland, and also earned 10*s*. a week in London, the charge of his keep in the two places being quite different, how are the jury, on that evidence alone, to determine the amount of damage?

WATSON, B.—I also am of the opinion that this rule should be discharged. On one part of the case, i. e., whether the action lies, I have no doubt; upon the other, i. e. what the damages should be, I had great doubts at first. I am clear that this action is one of that class which does not lie unless actual damage has accrued to the plaintiff; it is for the money lost that he is entitled to maintain the action. If this is not so, what is the measure of damages? Is it for the pain and suffering of the deceased? That is not the cause. It is then for the damage, and the damage alone, that the action is maintainable. As to the other point, I have had great doubts upon it, and those doubts are not quite removed from my mind; but I think it is impossible for us to keep the decision of the present case from the jury. The law has been laid down in one case in this court, and in another in the Common Pleas, that profit and anticipated benefit from the deceased is the subject-matter of damages in this kind of action; and that being so, what was the case here? It was that the plaintiff had a son of the age of about fourteen, who had been in work for a length of time, and had received 4*s*.